STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

The People of Cook County, the City of Chicago, the People of the State of Illinois, the Citizens Utility Board, and the Environmental Law & Policy Center of the Midwest	:	**98-0013**
Petition for Rulemaking on Non-Discrimination in Affiliate Transactions for Electric Utilities.	:	**(Cons.)**
Illinois Commerce Commission On Its Own Motion	:	**98-0035**
Implementation of Section 16-121 of the Public Utilities Act.	:	

ORDER

DATED: September 14, 1998

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ORDER

By the Commission:

I. PRELIMINARY MATTERS

On June 12, 1998, the Illinois Commerce Commission ("Commission") entered an order authorizing the adoption on an emergency basis, with an effective date of June 14, 1998, of 83 Ill. Adm. Code 450, "Non-Discrimination in Affiliate Transactions for Electric Utilities," pursuant to Section 5-45 of the Illinois Administrative Procedure Act ("IAPA") and the submission to the Secretary of State of the first notice of proposed rules at 83 Ill. Adm. Code 450, "Non-Discrimination in Affiliate Transactions for Electric Utilities," pursuant to Section 5-40 of the IAPA. The emergency rules were adopted to comply with Section 16-121 of the Public Utilities Act ("Act") (220 ILCS 5/16-121), which became effective on December 16, 1997. Section 16-121 provides:

> Non-discrimination; adoption of rules and regulations. The Commission shall adopt rules and regulations no later than 180 days after the effective date of this amendatory Act of 1997 governing the relationship between the electric utility and its affiliates, and ensuring non-discrimination in services provided to the utility's affiliate and any alternative retail electric supplier, including without limitation, cost allocation, cross-subsidization and information sharing.

The June 12, 1998 order provides the procedural history of these proceedings, summarizes the positions of the parties that presented testimony and/or filed briefs, and provides the reasons for the Commission's adoption of each section of the emergency rules, which are identical to the first notice rules.

The proposed rules were published in the *Illinois Register* on June 26, 1998, initiating the first notice period pursuant to Section 5-40(b) of the IAPA. Comments were filed by Illinois Power Company ("IP"); MidAmerican Energy Company ("MidAmerican"); Central Illinois Public Service Company, Union Electric Company and Ameren Corporation (collectively hereinafter referred to as "Ameren"); Northern Illinois Gas Company. d/b/a Nicor Gas ("Nicor Gas"); The Environmental Law and Policy Center of the Midwest ("ELPC");The Peoples Gas, Light and Coke Company, North Shore Gas Company, Peoples Energy Services Corporation, Peoples Energy Resources Corp. and Peoples Energy Ventures Corporation (collectively hereinafter referred to as "Peoples"); Commonwealth Edison Company ("ComEd"); the Edison Electric Institute ("EEI"); PG&E Energy Services ("PG&E"); the Consumer and Governmental Parties ("C&GP"), consisting of the Citizens Utility Board, the City of Chicago, the People of Cook County and the Illinois Attorney General; the Illinois Industrial Energy Consumers ("IIEC"); The Northern Illinois Chapter of the Air Conditioning Contractors of America, Blackhawk Energy Services, the Building Owners and Managers of Chicago, the Chemical Industry Council of Illinois, CITGO Petroleum Corporation, Enron Energy Services, Inc., the Illinois Restaurant Association, the National Federation of Independent Business, NEV-Midwest, L.L.C., the Refrigeration Service Engineers Society, Rockford Heating & Air Conditioning Inc., and Sieben Energy Associates (collectively hereinafter referred to as Enron et al.); and The National Association of Energy Services Companies ("NAESCO"). Reply comments were filed by IP, ComEd, C&GP, and Enron et al. With the end of the statutorily-mandated first notice period, the Commission can now submit the second notice of the proposed rules to the Joint Committee on Administrative Rules.

II. COMMENTS

Each Section of the first notice rule for which parties have proposed revisions in their comments is listed below, followed by the arguments on the proposed revisions, and the Commission's decision thereon.

A. Section 450.10 Definitions

"Affiliated interests in competition with alternative retail electric suppliers" shall include affiliated alternative retail electric suppliers, as well as affiliated interests that broker, sell, or market electricity, or that provide consulting services directly related to the sale of electricity.

"Corporate support" means joint corporate oversight, governance, support systems and personnel, involving payroll, shareholder services, financial reporting, human resources, employee records, pension management, state and federal regulatory affairs, legal services, lobbying, and non-marketing research and development activities.

1. Affiliated interests in competition with alternative retail electric suppliers.

ELCP and CG&P propose that the definition of affiliated interests in competition with alternative retail electric suppliers ("ARES") be expanded to include energy service companies ("ESCOs"). ELCP notes that ESCOs help customers to use energy more efficiently, or to use gas instead of electricity, in order to hold down energy bills. They contend that ESCOs affiliated with electric utilities would have an unfair competitive advantage over unaffiliated ESCOs if they are not subject to the same restrictions as affiliated interests in competition with ARES. Similarly, NAESCO asserts that the affiliated ESCOs have the potential to abuse market power in the same manner as affiliated ARES. Therefore, NAESCO concludes that affiliated ESCOs should be required to comply with the rules that are applicable to affiliated ARES.

In response, ComEd states that NAESCO admits that ESCOs and ARES perform separate functions. ComEd indicates that ESCOs do not supply or sell retail electric power, and do not require the use of a utility's transmission and distribution ("T&D") system in order to provide service. ComEd notes that as described by NAESCO, "an ESCO typically provides customers with equipment that uses or controls energy, software that monitors or controls energy usage, construction services and other related services and products that enhance energy usage." ComEd concludes that such services are outside the Act's restructuring and non-discrimination framework. ComEd indicates that the services provided by ESCOs are "competitive services" that are not subject to Commission oversight if provided by a utility since they are "services, other than tariffed services, that are related to, but not necessary for, the provision of electric power and energy." (See Sections 16-102 and 16-116(b) of the Act). ComEd concludes that nothing in the 1997 Amendments to the Act suggests that utilities should have any less flexibility to provide these competitive services through affiliates. IP indicates that the inclusion of ESCOs in the definition is anti-consumer since it would reduce the ability of affiliated ESCOs to offer lower prices and higher quality service.

IP and ComEd contend that the definition should not include affiliated interests that provide consulting services directly related to the sale of electricity. They note that the Commission's June 12, 1998 Order stated that such entities should be included in the definition to "assure non-discrimination in information sharing" and emphasized that "consultants of the utility that are privy to information related to the sale of electricity could bestow a competitive advantage on an affiliated ARES if the information was not shared contemporaneously with other ARES." (Order, p. 27) They assert that the

concern about information sharing is already addressed by Sections 450.60, 450.70 and 450.85 of the rules. IP indicates that inclusion of the consulting affiliates in the definition imposes costs on the utility's corporate family and thereby on consumers since the rules would require that such affiliates and the utility duplicate functions and facilities that they otherwise could have shared.

Enron et al. respond that the inclusion of consulting affiliates in the definition is consistent with the Act. They indicate that if the consulting affiliates were deleted from the definition, the consultants would be able to improperly share information and resources with the utility's affiliated ARES.

IP proposes that the definition exclude affiliated interests that do not sell electricity in the service territory of the affiliated electric utility.

Ameren contends that the definition should be excluded from the rules since it is overly broad and not supported by statute.

The Commission has considered the comments provided by the parties and concludes that modification of this definition is necessary. The definition is modified to recognize that it is only possible for an electric utility to provide an unfair advantage to affiliated interests in competition with ARES within its own service territory. Outside its own service territory, an electric utility and its affiliated interests in competition with ARES are simply competitors. The modification is shown in legislative style in the attached Appendix.

2. Competitive Services

IP recommends that competitive services be added to the terms defined in Section 450.10. IP proposes that Section 450.10 provide that "competitive services" has the same meaning as in Section 16-102 of the Act.

The Commission concludes that it is appropriate to adopt the statutory definition of this term for purposes of these rules. This definition is shown in legislative style in the attached Appendix.

3. Corporate Support

Ameren contends that the definition of corporate support should be deleted. Ameren asserts that the inclusion of the definition frustrates the ability of electric utilities to compete by limiting the sharing of non-essential services such as building maintenance, industrial relations, marketing and research and development ("R&D"). Ameren asserts that except for the monopoly T&D systems, all corporate support either is or could be provided to gas companies, power marketers and out-of-state energy companies by their umbrella corporations. Ameren indicates that any restrictions on

non-essential resource sharing between an electric utility and its affiliated interests would violate Section 16-111(g)(3) of the Act, which provides:

> (g) During the mandatory transition period, an electric utility may, without obtaining any approval of the Commission, other than that provided for in this subsection and notwithstanding any other provision of this Act or any rule or regulation of the Commission that would require such approval:
>
> (3) sell, assign, lease or transfer assets to an affiliated or unaffiliated entity and as part of such transaction enter into service agreements, power purchase agreements, or other agreements with the transferee; . . . .

IP indicates that the exclusive sharing of corporate support information, services and personnel between a utility and its affiliated interests will not impact the competitive balance of the energy market in Illinois and will allow economies of scope and scale to inure to the benefit of consumers. IP asserts that consumer welfare warrants that a utility be permitted to share any services or employees with its affiliated interests so long as such sharing does not result in the transfer of distribution-related information. Accordingly, IP concludes that corporate support should be defined as "any service, facility, or system that is not devoted to the provision of essential delivery services or the production of related necessary information." If this definition is rejected by the Commission, IP proposes an alternative definition that reflects its position that it is impossible to compile a complete list of "corporate support" activities. IP proposes that the definition be revised by substituting "including" for "involving" and by listing the following additional activities: auditing, information technology, data processing, marketing, advertising and all R&D activities.

ComEd states that the exclusion of marketing from the definition of corporate support, coupled with the Independent Functioning requirement in Section 450.100 of the rules, means that utilities and their affiliates in competition with ARES are precluded from engaging in joint marketing. ComEd asserts that the ban on joint marketing adversely affects legitimate competition and innovation. ComEd indicates that the ban on joint marketing will increase costs to consumers. ComEd also emphasizes that the ban only applies to electric utilities and their affiliated ARES, and that other participants in the retail electric market will be able to engage in joint marketing with their affiliates. ComEd recognizes, however, that the Commission concluded that allowing joint marketing could make it difficult for effective retail electric competition to develop. ComEd also notes that it is difficult to define "joint marketing." Accordingly, ComEd recommends that rather than banning joint marketing per se, the rules should place certain limitations on joint marketing in new Section 450.25. Those limitations would prohibit electric utilities from providing sales leads to their affiliated interests in competition with ARES, engaging in joint sales calls with such affiliated interests, and using a common sales person to sell products or services of both them

and such affiliated interests. ComEd also proposes that any joint advertising by an electric utility and its affiliated interests in competition with ARES to customers in the utility's service area include an explicit notice that the utility provides no advantages relating to the scheduling, transmission or distribution of electricity to such affiliated interests or their customers relative to unaffiliated entities and their customers. ComEd indicates that its proposed limitations on joint marketing will result in additional costs, such as costs of duplicate sales forces. In light of the additional costs, ComEd proposes that the rules include a three-year sunset provision for the ban of the identified joint marketing activities.

ComEd also contends that the definition of corporate support should be expanded to include marketing research and development activities and advertising. ComEd indicates that joint marketing R&D provides numerous pro-competitive benefits, such as the sharing of substantial economic risks involved in R&D, and increased economies of scale. ComEd further asserts that a ban on joint advertising by a utility and its affiliated interests in competition with ARES would be harmful to consumers and raises serious First Amendment concerns. ComEd contends that joint advertising does not raise the same competitive concerns as joint marketing and also results in cost savings.

Finally, ComEd also proposes language in its new Section 450.25 that permits utilities to refer customer requests for information about its affiliated interests in competition with ARES to such affiliated interests so long as the utility notifies the customer that other ARES exist and that a list of ARES is available. ComEd asserts that prohibition of such referrals will frustrate customers.

MidAmerican contends that the definition of corporate support is unduly restrictive. MidAmerican recommends that the following activities be added to the list of corporate support activities: administrative services (such as travel administration, safety, security, copy room, graphics, custodial services, secretarial pool, mail services and file storage), financial management administration (including accounting, taxes, financial planning, merger and acquisition planning and treasury), corporate communications, environmental services, information services (hardware, software and systems support), internal audit services and purchasing (excluding the purchasing of electricity, generation facilities and fuel). MidAmerican asserts that denial of the right of utilities and their affiliated interests to share such services makes them less efficient and places them at a competitive disadvantage. MidAmerican concludes that the inclusion of such activities in the definition will not impair competition.

EEI recommends that joint marketing and marketing R&D activities be added to the definition of corporate support. EEI contends that such activities are economically efficient and result in lower costs to consumers. EEI emphasizes that ARES that are not affiliated with utilities are free to engage in such joint activities with their affiliates.

Peoples contends that the list of activities under corporate support omits numerous activities administrative or ministerial in nature that would not provide any undue benefit to electric utilities and their affiliates vis-à-vis competitors. Peoples indicates that examples of such activities include accounts receivable, accounts payable, cash receipts, typing and duplicating functions, petty cash functions, janitorial services and security services. Peoples concludes that the term "non-marketing administrative activities" should be included in the definition.

Nicor Gas recommends that the definition be modified to include joint marketing, joint marketing R&D and joint sales calls, and that it be clarified that billing and credit and call center functions are part of corporate support. Nicor Gas states that joint marketing and sales activities by utilities and their affiliates utilize economies of scope and scale, result in cost savings to consumers, and reflect customers' desires for one-stop shopping for energy services. Nicor Gas also indicates that joint marketing, joint marketing R&D and joint sales activities foster the development of innovative integrated or complementary services. Nicor Gas emphasizes that ARES unaffiliated with electric utilities can avail themselves of shared corporate support from their umbrella corporations. Nicor Gas also asserts that commercial speech, such as advertising and marketing, is entitled to significant protection under the First Amendment. Nicor Gas indicates that permitting electric utilities and their affiliates to share billing and credit and call center services would not result in a competitive disadvantage for unaffiliated ARES.

PG&E contends that the exclusion of marketing activities from the definition is necessary to ensure that all entrants have an equal opportunity to participate in the competitive market. PG&E requests that the rule clarify that the ban on joint marketing precludes a utility from giving customer leads or referrals to its affiliated interests in competition with ARES and that joint sales calls are prohibited. PG&E asserts that the referral of calls to the utility's energy marketing affiliate creates the impression that the utility endorses the affiliate and that customers of the affiliate could receive preferential treatment from the utility. PG&E also recommends that the rules require a disclaimer when a utility affiliate uses a name or logo that is the same or similar to that of the utility. PG&E states that the disclaimer should clarify that the affiliate is not the same entity as the utility and is not a regulated entity, and that the customer is not required to purchase services from the affiliate as a condition of receiving services from the utility. Finally, PG&E recommends that the rule clarify that utilities and their affiliated interests in competition with ARES (1) cannot engage in joint R&D of products and services that have the potential to compete with unaffiliated ARES' services, and (2) cannot engage in joint planning of future business activities, including plans for capital investments.

C&GP recommends that the rules clearly state that joint marketing by a utility and its affiliates is banned. C&GP proposes that the rules state that the ban includes, among other things, the prohibition of (1) the use of the utility name or logo by affiliates in competition with ARES, (2) sales leads from the utility to such affiliates, (3) joint sales calls by the utility and such affiliates, and (4) the use of a common sales person

to sell their products and services. In supporting the ban on joint marketing, CG&P acknowledges that non-Illinois companies can jointly market with their affiliates. CG&P emphasizes, however, that these out-of-state companies do not have the name recognition in Illinois that the Illinois utilities possess.

In response to C&GP, IP and ComEd indicate that the arguments against the use of the utility name or logo by affiliates have been rejected by the Commission.

Enron et al. assert that if utilities were allowed to jointly market with their affiliates, utilities would be able to engage in the type of cross-subsidization, discrimination and information sharing that was intended to be prevented by Section 16-121 of the Act. They also assert the prohibition of joint marketing and advertising does not violate the First Amendment. They indicate that a compelling state interest, the legislatively mandated transition and restructuring of the electric market in Illinois, supports the prohibition of joint marketing.

The Commission concludes that the definition of "Corporate support" should be expanded by adding several corporate activities that may be shared between a utility and its affiliated interests. The Commission concludes that none of the permitted activities would grant a utility an undue competitive advantage in the emerging marketplace.

In general, the revisions proposed in the comments of the utilities, while an improvement over previous suggestions, fall short of addressing the Commission's fundamental concerns with respect to joint marketing. In brief, the Commission believes that allowing joint marketing within the incumbent utility's service territory could result in the transfer of valuable information and provide inherent market advantages that can be funneled to an affiliated interest in competition with ARES. This information and advantage not only could be costly for competitors to duplicate, it may not be available at all. Potential entrants may in fact be large, well-capitalized companies, but none of those companies will have the ability to jointly market with the owner of the delivery services facilities. A more analogous situation would be an affiliated interest in competition with ARES jointly marketing energy services with a utility-affiliated ESCO. Such a transaction would not be prohibited under these rules.

Particularly noteworthy are the comments submitted by ComEd and its proposed Section 450.25. ComEd, which appears to have a firm grasp on the direction where the Commission believes these rules need to go, properly identified several areas of concern in its proposed Section 450.25. However, at this late date, we are reluctant to accept such a proposal. The primary reason for our reluctance is that ComEd's proposed Section 450.25 does not appear to resolve the problems identified by ComEd and other utilities. Contrary to the utilities' assertions, the Commission does recognize that the ban on joint marketing imposed by our first notice rules may require utilities and their affiliates to incur costs to duplicate their sales forces and database systems. *See, e.g.,* ComEd Comments at 29 -30. However, subsections (a), (b) and (c) of ComEd's

proposed Section 450.25 would still require the duplication of such efforts. In light of this apparent inconsistency and the inability of the parties to provide a clear definition of joint marketing and advertising, the Commission is reluctant to attempt to establish a list of every possible discriminatory (i.e., anti-competitive) aspect of joint marketing for fear of having missed other advantages that can be bestowed upon an affiliated interest in competition with ARES. There are simply too many unknown advantages that a utility's affiliated ARES may have over its competitors due to the utility's control over the transmission and distribution system and the services and information related thereto.

In light of the difficulty of this decision, the Commission takes comfort in the support that we have received on this issue from the numerous consumer groups, namely C&GP, the Building Owners and Managers of Chicago, IIEC, the Chemical Industry Council of Illinois, the National Federation of Independent Businesses and the Illinois Restaurant Association, which represent the recipients of the benefits that the utilities have alleged. Indeed, these groups recognize the fact that any benefits to a utility and its affiliated interests in competition with ARES from joint marketing would not necessarily be transferred to customers in the absence of competition and that without such a restriction, competition for their patronage may be less robust.

With respect to ComEd's proposal to impose a three-year sunset provision, the Commission believes the issue of joint marketing and advertising may need to be revisited at a future date. At this point, the Commission does not believe that the ban on joint marketing imposed by Section 450.25 must necessarily extend three years beyond the date when each class becomes eligible for open access. Indeed, the adoption of such a shortsighted provision would imply that the purpose of the ban is to jump-start competition by handicapping the incumbents, as the utilities (and even potential competitors) may believe. Rather, the purpose is to prevent discriminatory access to information and other inherent advantages currently held solely by the incumbent vertically integrated utilities.

In our opinion, the appropriate duration of the ban appears to be contingent, in large part, upon the implementation of a reasonable rule on functional separation. Once the appropriate rule on functional separation is in place pursuant to Section 16-119A of the Act, the Commission will be prepared to revisit this issue yet again. However, to allow joint marketing at this point in the transition period would be to allow an affiliated interest in competition with ARES to exploit the utility's unique position as the monopoly provider of electricity service, namely its control over transmission and distribution services. Until this monopoly component of the vertically integrated utilities is separated from the utilities' power marketing efforts and other related activities, competition is less likely to flourish.

In order to help place these rules in their proper context, the Commission notes that these rules may appear to be unnecessary to some or incomplete to others because the utilities will retain all of the discriminatory advantages associated with the

provision of a monopoly service. Although such views are well founded, they reflect an incomplete picture of the actions that must be taken to transition utilities to a competitive market. By authorizing the Commission to implement functional separation rules, the General Assembly clearly did not envision allowing the utility to exploit its control over the monopoly services indefinitely. So, to the extent that utilities currently have an unfair advantage over their competitors due to their control over monopoly functions, this advantage will be short-lived, as the rules adopted pursuant to Section 16-119A of the Act will complete the efforts made in this rule with respect to affiliate transactions.

New Section 450.25(a) of our rule should make absolutely clear the Commission's position on joint advertising and marketing. Regarding the use of an electric utility's name and corporate logos by an affiliated interest in competition with ARES, ComEd's interpretation of our intent in the emergency rules is correct. In excluding joint marketing from the definition of corporate support in Section 450.10, it was not and is not the intent of the Commission to ban an affiliated interest in competition with ARES' use of the utility's name or logo, as C&GP and others have asserted. The Commission does not view an affiliated interest in competition with ARES' use of a utility's name or logo as corporate support. Rather the Commission views them as an intangible shareholder asset that transcends the scope of corporate support. To clarify this position, the Commission has added subsection (b). Whether the use of company names and logos will create any misperceptions on the part of consumers, as C&GP alleges, seems plausible, but less likely given the prohibition against joint marketing and advertising imposed by this section and the non-discriminatory provision in Section 450.20(c). Furthermore, at this point, the Commission believes it would be doing a tremendous disservice to consumers by essentially requiring affiliated interests in competition with ARES to masquerade as non-affiliated entities, when they are in fact affiliated.

B. Section 450.20 Non-Discrimination

a) Electric utilities shall not provide affiliated interests or customers of affiliated interests preferential treatment or advantages relative to unaffiliated entities or their customers in connection with services provided under tariffs on file with the Illinois Commerce Commission ("Commission"). This provision applies broadly to all aspects of service, including, but not limited to, responsiveness to requests for service, the availability of firm versus interruptible services, the imposition of special metering requirements, and all terms and conditions and charges specified in the tariff.

b) Except for corporate support transactions and services that have been declared competitive pursuant to Section

16-113 of the Act, transactions between an electric utility and one or more of its affiliated interests in competition with alternative retail electric suppliers that are not governed by tariff sheets on file with the Commission shall not discriminate in relation to unaffiliated alternative retail electric suppliers.

c) Electric utilities and affiliated interests shall not notify potential or actual customers, either directly or indirectly, advertise to the public, or otherwise communicate that the electric utility provides any advantages relating to the scheduling, transmission or distribution of electricity to affiliated interests or their customers relative to unaffiliated entities and their customers.

d) A utility shall process requests for similar services provided by the utility in the same manner and within the same time period for its affiliated interests in competition with alternative retail electric suppliers and for all similarly situated unaffiliated alternative retail electric suppliers and their respective customers.

e) If discretion is permitted in application of a tariff provision, electric utilities shall maintain a log detailing each instance in which it exercised discretion, as required in Section 450.140(d).

f) If an electric utility offers affiliated interests or customers of affiliated interests a discount, rebate, fee waiver or waivers of its ordinary terms and conditions for services provided under tariffs on file with the Commission, it shall contemporaneously offer the same discount, rebate, fee waiver or waivers of its ordinary terms and conditions to all unaffiliated entities and customers of unaffiliated entities, to the extent consistent with the tariffs. If an electric utility offers affiliated interests or customers of affiliated interests services that are not governed by tariff sheets, except for corporate support transactions and services that have been declared competitive pursuant to Section 16-113 of the Act, it shall contemporaneously offer such services to all unaffiliated entities and customers of

unaffiliated entities. Electric utilities shall maintain a log of such instances, as required in Section 450.140(d).

Ameren proposes to delete subsections (b), (d), (e) and (f) in their entirety. Ameren asserts that the obligations imposed under subsection (a) are adequate to assure tariffs are applied on a non-discriminatory basis. It is the position of Ameren that the proposed rules would impose the affirmative obligation on an electric utility to offer many non-essential services to its competitors. Ameren further argues that to the extent the proposed rules could be construed to regulate competitive services or require that an electric utility offer competitive services, properly defined, under the same terms and conditions to all entities, they would be in direct conflict with Sections 16-102 and 16-116 of the 1997 Act and unlawful. Finally, Ameren argues that the expensive requirements that logs be maintained will, in the end, prove unhelpful in enforcing rules because the information required to be reported would be extremely voluminous and mostly unrelated to competitive issues.

ComEd proposes to delete the second sentence of subsection (f); modify the first sentence of subsection (f) to explicitly indicate the sentence does not apply to billing experiments under Section 16-106 of the Act or to competitive services; restrict an electric utility's ability to provide power and energy to an affiliated interests in competition with ARES; delete the log requirements of subsection (f) and; add a requirement that the utility provide a disclaimer that participation in billing experiments or contracts for power and energy from the electric utility are not conditioned on taking service from affiliates of the electric utility. Like Ameren, ComEd argues that subsection (f), as written, is in conflict with Sections 16-102, 16-106, and 16-116(b) of the 1997 Act. ComEd asserts that its additional language and restrictions are intended to address the Commission's concerns about billing experiments and competitive contracts without violating the 1997 Act. Finally, ComEd asserts that it would be difficult for utilities to comply fully with the proposed log requirements, that documents generated by ComEd in the normal course of business should provide a sufficient record for the Commission's purposes, and that competitors, as well as customers and consumer and government representatives, can be counted on to be vigilant for real or perceived violations.

EEI recommends removing the requirements of subsection (f) that require electric utilities to provide non-tariffed services to unaffiliated entities and customers of unaffiliated entities. EEI claims that subsection (f) unreasonably restricts a utility's ability to offer competitive non-tariffed services. EEI states that requiring the sharing of non-tariffed services attempts to socialize the economies of integration that inherently are a part of any business organization, including those of integrated new market entrants. Finally, EEI states that the exceptions in the proposed rule do not include all of the competitive services permitted under the Act.

IP offers three alternatives that would variously: modify subsection (a), delete or modify subsection (b), delete or modify subsection (c), modify subsection (d), delete

subsection (e) and, delete or modify subsection (f). IP supports modification of this section to provide nondiscriminatory access to essential distribution facilities and related information to all ARES.

IP asserts that subsections (a), (b) and (f) improperly impose a non-discrimination requirement on all transactions – tariffed and non tariffed – between an electric utility and all of its affiliates, not just those that are in competition with unaffiliated ARES. IP asserts that the proposed rules are overbroad and damaging to consumer welfare. IP also claims that subsections (b) and (f) violate Sections 16-102, 16-106, 16-111(g) and 16-116(b) of the Act. Finally, IP argues that the requirement that utilities maintain various logs pursuant to subsection (e) is unduly burdensome, unnecessary and should be rejected.

C&GP recommends that Section 450.20 (or alternatively Section 450.10, or the explanatory language discussing these sections) should be structured in a way that clearly states that joint marketing is banned. C&GP also responds to the arguments of Ameren, ComEd and IP that Section 450.20(f) is overly broad. C&GP asserts that Section 16-121 requires that the Commission set rules that regulate the utility-affiliate relationship comprehensively, not just rules regulating the utility-affiliated ARES relationships. C&GP states that the only limitation on billing experiments in the rules apply to a utility offering billing experiments directly to its own affiliates or to the customers of the utility's affiliates and that such a limitation is imminently reasonable. C&GP asserts that the rule is clear - a utility may still offer billing experiments to its own customers consistent with Section 16-106 of the Act.

Enron et al. state that Section 450.20(f) is consistent with the 1997 Act and is supported by the substantial evidence in the record. Enron et al. assert that Section 450.20(f) properly effectuates the requirement of Section 16-121 of the 1997 Act that utilities not be allowed to confer advantages upon their affiliates. Enron et al. claim that the utilities have not explained why they need to be allowed to offer billing and pricing experiments to affiliated interests or what legitimate objectives would be achieved by utilities offering discounts to utility affiliates. Enron et al. claim that the rules do not prohibit utilities from achieving any legitimate purpose associated with billing and pricing experiments authorized under Section 16-106 of the Act and that the utilities still have extraordinary authority to conduct appropriate experiments.

IIEC asserts that Section 450.20(f) is consistent with the 1997 Act. IIEC claims that the alleged inconsistencies between the rule and the Act overlook the applicability of the 1997 Act in contrast to the proposed rule. IIEC states that the allegedly problematic Sections of the Act refer to "customers" and "retail customers." IIEC claims that noticeably absent is any reference to billing experiments or competitive services being offered specifically to the utility's affiliate. IIEC asserts that because Section 450.20(f) only affects the utility's affiliate and the customers of the utility's affiliate, and not the customers or companies taking service from the utility, there is no conflict. Finally, IIEC asserts that the Commission was given the broad authority to approve a

rule that would govern the relationship between the utility and its affiliate, with the purpose of enhancing competition. IIEC states that competition cannot be enhanced, indeed will not come to exist, if the utilities are able to circumvent the rule by carving out specious exceptions.

IP claims that C&GP's assertion that Section 16-121 of the Act requires rules that regulate the utility-affiliate relationship comprehensively is erroneous. IP asserts that the proposed rules dealing with non-discriminatory access to the distribution facility, customer information, and the prohibition on cross-subsidization, and requirements that utility/affiliate transactions be pursuant to services and facilities agreements ("SFAs") would legally suffice in meeting the requirements of Section 16-121. IP also claims that Enron et al. and IIEC fail to recognize that subsection (f) would create a socialization regime that extends beyond a utility's provision of resources, services, and discounts to affiliated interests. IP asserts the rule would also apply to a utility's supply of those same items to customers who fortuitously already were customers of its affiliated interests.

The Commission concludes that Section 450.20(f) of the first notice rules should be revised to address concerns that it may have been too expansive or be inadvertently triggered. (See e.g., Comments of ComEd, at 15) For example, the failure of a utility to properly identify a customer of its affiliated interests before offering billing experiments pursuant to Section 16-106 of the Act or contract services would have triggered the requirements of this provision. This was not the intent of the language. One of the original purposes of this provision was to supplement the ban on joint marketing, which was indirectly imposed by the definition of corporate support in Section 450.10, and the non-discrimination provisions of Section 450.20(b). The Commission stated in its first notice Order that:

> In light of the utilities' broad authority to offer **traditional utility services** on a non-tariffed basis, such as their authority under Section 16-106, we are compelled to extend Section 450.20(c) of Staff's proposed rule to non-tariffed services. This change, however, does not prohibit utilities from independently offering such non-tariffed services to their own customers.
>
> First notice Order at 29 (**Emphasis Added**)

The Commission implicitly recognized that certain traditional utility services may include those types of services that are "essential" in nature and thereby may provide the incumbent electric utility with the ability to advantage its affiliated interests. Upon further consideration, however, the Commission believes that the provisions of Section 450.20(b) and the prohibition against tying contained in the new subsection (g) will help to alleviate this concern. The changes to Section 450.20(f) and the new Section 450.20(g) are shown in legislative style in the attached Appendix.

The amendment adopted by the Commission to Section 450.20 (f) that exempts billing experiments and competitive services from the requirement that the utility offer unaffiliated entities and customers of unaffiliated entities any discount to tariffs the utility offers to its own affiliated interests or customers of affiliated interests raised a new concern with the Commission. Section 16-102 of the Act provides that "delivery services shall not be a contract service until such services are declared competitive pursuant to Section 16-113." The Commission is concerned that a utility could discount the price for delivery service to an affiliated interest or a customer of an affiliated interest and then conceal that discount by burying it in a bundled service (e.g., contract service or billing experiments). Delivery services are the heart of access to the essential transmission and distribution system, and until delivery services are declared competitive under Section 16-113 of the Act, there should be no discrimination with regard to the price of delivery services. Therefore, the Commission has adopted Section 450.20 (h), as shown in the attached Appendix.

C. Section 450.30 Non-Discrimination Concerning Services Provided Pursuant to Section 16-118 of the Public Utilities Act

In providing any service or engaging in any activity pursuant to Section 16-118 of the Act, whether such service or activity is governed by tariffs filed with the Commission or by other agreements, electric utilities shall not discriminate or provide preferential treatment in favor of their affiliated interests. Offers to provide service pursuant to Section 16-118 of the Act, whether through tariffs or agreements, shall be made concurrently to all similarly situated alternative retail electric suppliers or electric utilities other than the electric utility in whose service area retail customers are located.

ComEd proposes to restrict the application of this section to tariffed services and to affiliated interests in competition with ARES. ComEd asserts that this section conflicts with Section 16-118 of the Act governing contracts with ARES and is overbroad, in that it applies to all utility affiliates, even though Section 16-118 encompasses utility services and contracts solely with ARES. ComEd claims that in Section 16-118, the General Assembly specifically provided utilities with the ability to enter into individual agreements with ARES pertaining to interconnection and the payment of customer charges and to incorporate distinct terms for different entities and customers. ComEd states that the Commission has no lawful power to take away this flexibility that the legislature provided. Finally, ComEd asserts that because there is not a single service or contract contemplated by Section 16-118 that would involve any entity other than an ARES, the rule's application should be limited to affiliated interests in competition with ARES.

IP recommends restricting the application of this section to essential services and activities and to affiliated interests in competition with ARES. IP states that Section

16-118 mandates that utilities provide certain electric power and energy or delivery services to ARES through tariffs. IP asserts, however, that requiring utilities to offer tariffed services on a non-discriminatory basis is overbroad because not all tariffed services will be essential.

The Commission has given the comments submitted due consideration and concludes that changes to the first notice rules are not necessary.

D. Section 450.40 Tying

Except for services that have been declared competitive pursuant to Section 16-113 of the Act, electric utilities shall not tie or otherwise condition the provision of any services, discounts, rebates, fee waivers, or waivers of the electric utilities' ordinary terms and conditions of service, including but not limited to tariff provisions, to the taking of any goods and services from the electric utilities' affiliated interests.

Ameren recommends limiting the tying prohibition of this section to violations of state or federal law. Ameren argues that this section is overly broad because it seemingly forbids all tying arrangements without inquiry into whether the products or services at issue are truly separate; whether a buyer actually has been coerced into purchasing a product or service that he or she did not want; whether the seller has sufficient economic power in the market to enable it to produce an appreciable restraint in the market for the tied product; whether an insubstantial amount of commerce in the tied product has been affected; or whether the tie creates a substantial potential for impact on competition. Ameren asserts that this section prohibits far more activity than encompassed by antitrust laws and thus is far broader than necessary to achieve any legitimate end. Moreover, Ameren states that this section violates Sections 16-102 and 16-116 of the Act, which authorize an electric utility to provide competitive services notwithstanding any rule or regulation of the Commission.

ComEd proposes limiting the tying prohibition of this section to delivery services and to affiliated interests in competition with ARES. In addition, ComEd proposes to restrict tying to the definition in state and federal antitrust law. ComEd states that this section is overbroad as written and, depending on how it is interpreted and applied, potentially both anti-consumer and anti-competitive. ComEd states that its purpose in restricting tying to the definition in state and federal antitrust law is to ensure that all parties have the same definition of tying in mind, and that ambiguities in what the Commission means by its rule are not used to block pro-competitive offerings. ComEd asserts that this section potentially condemns activities that enhance competition and consumer welfare by depriving consumers of desirable and innovative product offerings and the potential for lower priced products and services. ComEd further asserts that many combined product offerings do not cause competitive harm, but such arrangements often enhance competition.

ComEd states that this section, because of its virtually unlimited scope, could preclude utilities from competing on the same terms as their competitors, and thus lessen, not enhance competition. ComEd further states that this section is problematic because the prohibition is not limited to affiliates in competition with ARES, but applies by its terms to all utility affiliates. As a result, ComEd asserts that under this section, a utility that sells high efficiency heat pumps might not be able to package the product with energy audits provided by a non-ARES affiliate. ComEd states that the Commission should not undermine the ability of non-ARES affiliates to compete in other markets, particularly with no investigation into the need for rules relating to those markets.

IP suggests that the Commission should either: (1) delete the entire section; (2) restrict the tying prohibition to essential delivery services; or (3) broaden the exception to include competitive services as defined in Section 16-102 of the Act. IP states that product combinations should be encouraged so long as they do not enable a seller to leverage its monopoly control over a given product into effective monopoly control over another. IP asserts the proposed tying rule is rendered unnecessary by other proposed regulations and by the anti-trust laws. IP states that anti-competitive tying is not possible where the Commission prohibits the utility from exploiting its ownership or control of distribution facilities by mandating that all competitors be granted nondiscriminatory access to those facilities at a regulated price, as Section 450.20(a) would do. In addition, IP asserts that state and federal antitrust laws will be applied carefully to scrutinize any alleged tying by the utility. IP states that the proposed tying rule threatens to harm consumers by preventing utilities and their affiliates from offering product combinations that are perfectly legal under a century of antitrust law – a century of judicial scrutiny declaring anti-consumer competitive actions illegal and pro-consumer business behavior legal. IP also states that to the extent the tying prohibition encompasses the utility's provision of competitive services, it is contrary to the letter of the Act.

C&GP states that the proposed rule properly includes a tying prohibition because there is no specific statute that prohibits tying, just case law. C&GP claims that the federal process can be much longer and require parties to expend greater resources than a Commission proceeding. Even more important, C&GP asserts, the federal courts do not have the expertise the Commission has regarding the products and services sold by utilities and their affiliates. C&GP argues that the fact the Commission limits the rule to services that have not been declared competitive should assuage the utilities' concerns. C&GP states that the transmission system is not the only aspect of service that utilities currently maintain in their monopoly portfolio. C&GP argues that encouraging competition requires that the utilities not be allowed to use any unearned economic advantage to deter competition, even if it means sacrificing some economies of scope and scale in the short term.

Enron et al. state that the utilities fail to recognize the distinction between tying, on the one hand, and bundling, on the other. Enron et al. assert that utilities may bundle many competitive services together, but may not tie or otherwise condition the provision of one service upon the acceptance of another. Enron argues that if the utilities offer bundled services, they must also offer the unbundled, separately-priced component services. Enron et al. state that contrary to the utilities' implication, only utilities are capable of tying discounts on services which are offered under their tariffs to services which are offered by the utilities' affiliates. Enron et al. conclude that the rules properly prohibit improper tying.

In response to C&GP, IP states that the case law prohibition against illegal tying is direct and is indefinite only to the extent it permits sensible case-specific analysis. Further, IP argues, the availability of preliminary injunctions and pre-judgment interest addresses any claim that the elapse of time during litigation makes the deterrent effect of anti-tying rules less real. IP asserts that C&GP's argument regarding the federal courts' lack of expertise in the specific products and services sold by utilities and their affiliates is irrelevant. IP claims the courts have analyzed tying claims relative to products and services of all shapes and sizes. In response to C&GP's statement regarding the applicability of the tying prohibition to services that have not been declared competitive, IP states that the definition of competitive services under the 1997 Act is broader than only those services declared competitive. IP further states that the point is not that the proposed rules permit the bundling of those services that have been declared competitive. Instead, IP argues that the only products and services that the rules should prevent sellers from combining with other products and services are those over which the seller has a monopoly. IP also asserts that Enron has misread economics and anti-trust law by employing a "significant advantage" standard in its comments. IP claims that the distinction between acceptable bundling and illegal tying is that the latter necessarily involves exploiting a monopoly.

Based upon its review of the comments filed by the parties, the Commission concludes this section should be modified. The Commission adopts ComEd's proposed revisions which limit the tying prohibition to delivery services and affiliated interests in competition with ARES. Furthermore, the Commission concurs with ComEd that this tying prohibition should be based on the definitions in state and federal antitrust law. The modification is shown in legislative style in the attached Appendix.

E. Section 450.60 Nondiscriminatory Provision of Information to Unaffiliated Entities

a) Any ARES may submit, to an electric utility, a written standing request for information related to the electric utility's transmission or distribution systems that is provided by the utility to the electric utility's affiliated interests. Standing requests made pursuant to this

section shall expire one year after being received by the utility unless renewed in writing by the ARES.

b) Employees of the electric utility's affiliated interests shall not have preferential access to any information about the electric utility's transmission or distribution systems that is not contemporaneously and in the same form and manner available to an unaffiliated alternative retail electric supplier that has submitted a request pursuant to subsection (a) of this section.

IP proposes to limit the application of subsections (a) and (b) to affiliated interests in competition with ARES; add the modifier "similarly situated" to unaffiliated ARES in subsection (b) and; add subsection (c) which restricts the ability of unaffiliated ARES to distribute information obtained from the electric utility. IP states that the proposed rule is overbroad relative to what triggers the obligation to share information. IP asserts the rule improperly requires information to be shared with any ARES that requests it if the utility shares such information with any affiliated interest. IP claims it is improper for unaffiliated entities to be entitled to information shared by the utility with affiliates that are not engaged in the retail electricity business.

The Commission has considered IP's comments and concludes that changes to the first notice rules are not necessary.

F. Section 450.80 Exception for Corporate Support Information

Except as proscribed by Sections 450.60 and 450.70, electric utilities may share information concerning corporate support with affiliated interests without being required to share such information with unaffiliated entities.

Ameren recommends that this section be deleted. Ameren states that the 1997 Act can only be interpreted to require non-discrimination with regard to essential facilities employed in the distribution and transmission services. Ameren claims that Section 16-121 of the Act should not be read to authorize the Commission to preclude efficient sharing of non-essential services such as building maintenance, tax, industrial relations, marketing, and research and development, none of which the record indicates are prohibited to gas utilities or out-of-state electric providers. Ameren states that under the 1997 Act, competition is assured by opening up distribution facilities through use of the delivery service tariff.

The Commission has considered Ameren's comments and concludes that it is not appropriate to delete this section.

G. Section 450.100 Independent Functioning

Except in relation to corporate support and emergency support, electric utilities and affiliated interests in competition with ARES that provide services to customers within the utility's service territory shall function independently of each other and shall not share services or facilities.

Ameren recommends that this section be deleted. Ameren states that creating an appropriate competitive opportunity by protecting customer information and preventing discrimination in access to essential facilities does not require physical separation. Ameren asserts that access to essential information and facilities can be assured by structures such as those contained in Section 450.60(b) of the rules and in the delivery services tariff which will be in place pursuant to Section 16-108 of the Act. Ameren also claims that this section may violate Section 16-111(g) of the Act which permits a wide range of transactions and services agreements with affiliates.

IP suggests that the Commission either: (1) delete this section; or (2) limit the application of this section to affiliated interests in competition with ARES that sell electricity to retail customers in the utility's service territory. IP claims that this section sacrifices economies of scope and scale in return for supposed benefits that, in reality, provide subsidies to competitors so that they are placed on a so-called "equal" footing with the incumbent utility and its affiliates. IP states that not all affiliates and utilities will become identical service providers. Thus, IP claims, resource sharing will permit whichever entity that enters a particular market to do so at the lowest cost to consumers. IP also states that a utility and its corporate affiliate do not "collude" when they share corporate resources. IP states that the 1997 Act does not prohibit a utility from offering electric service through itself, its affiliated ARES, or both if it so chooses. IP claims the Legislature could well have mandated that these corporations choose a single entity through which to compete for retail electricity customers on the open market, but did not. IP states that the proposed rules cannot legally reverse the Legislature's unambiguous decision.

IP asserts that the underlying rationale for this section, to level the playing field, is inconsistent with the record and the Commission's own findings regarding the leveling approach. IP further asserts that the leveling approach is anti-consumer and increases the costs to utilities and their affiliates by destroying efficiencies that such sharing makes possible. IP claims that so long as the proposed rule guarantees access to essential service and information related to the distribution system, the alleged need for an independent functioning rule falls away.

Enron et al. state that if the Commission revisits the rules, it should clarify the steps necessary to implement independent functioning in the rules. Enron et al. suggest that absent such clarification, the utilities likely will attempt to exploit the lack of clarity to the greatest extent possible.

The Commission has given the comments submitted due consideration and concludes that the proposed changes to the first notice rules are not necessary.

H. Section 450.110 Employees

a) Except in relation to corporate support and emergency support, electric utilities and their affiliated interests in competition with alternative retail electric suppliers shall not jointly employ or otherwise share the same employees.

b) Electric utilities shall not jointly employ or otherwise share employees engaged in providing delivery services with their affiliated interests in competition with alternative retail electric suppliers.

c) Subsections (a), (b) and (d) of this section shall not apply to any employee covered by a collective bargaining agreement subject to federal labor law, including the Labor Management Relations Act and the National Labor Relations Act.

d) Each electric utility that has an affiliated interest in competition with ARES shall maintain a log detailing the transfer of employees: from the utility to its affiliated interests in competition with ARES; from the utility to its other affiliated interests and; from the utility's other affiliated interests to its affiliated interests in competition with ARES. This subsection shall not apply to employee transfers to or from corporations that are affiliated interests of the electric utility solely because they share a common director. The log shall be made available to the Commission upon request.

IP recommends that subsection (a) be deleted since the prohibition of employee sharing harms consumers by destroying economies of scale and scope. IP emphasizes that the sharing of employees maximizes efficiency and reduces costs. IP asserts that the prohibition of employee sharing should be restricted to those employees who operate essential distribution systems and have access to related necessary information. IP concludes that the sharing of other employees does not result in discrimination against competitors. For similar reasons, IP proposes that subsection (d) be deleted or that the log requirement be limited to transfers of employees engaged in providing essential delivery services. If the log requirement in subsection (d)

remains in the rules, IP recommends the addition of language allowing utilities to designate the logs as confidential.

ComEd contends that subsection (a) is overly broad and should be deleted. ComEd agrees with IP that the prohibition on employee sharing should only apply to employees with information related to the utility's T&D functions. ComEd also recommends that subsection (b) be modified to exclude from the employee sharing restriction: officers and their support staff who exercise shared corporate oversight and governance but do not participate in organizing or executing day-to-day operations with respect to delivery services. ComEd asserts that without its modification to subsection (b), a utility holding company could not function efficiently. ComEd also recommends that subsection (d) be modified by excluding from the log requirement the transfer of employees from the utility's other affiliated interests to its affiliated interests in competition with ARES.

C&GP recommends that the rule impose restrictions on the ability of the utilities to transfer employees to their affiliates. C&GP contends that employees should not be able to move back and forth between the utility and its affiliate for a two-year period and that the employees should be restricted from using information acquired during their employment with the utility in a way that would provide a discriminatory advantage to the affiliate. C&GP also contends that the rule should provide the opportunity to investigate whether the affiliates should be required to pay a 25% premium to the utility for a transferred employee, based on the typical cost to a competitor to hire the employee. C&GP states that these restrictions are necessary to prevent discriminatory conduct and to deter utilities from transferring valuable employees.

Enron et al. recommend that restrictions be imposed on the shuttling of employees between the utility and its affiliates.

PG&E proposes that the utility pay a fee to an affiliate that hires an employee of the utility, and that such fee reflect the compensation that would have been paid to an employment agency. PG&E contends that its proposal avoids subsidization of utility affiliates by the utility and requires the utility affiliate to bear the recruiting cost as an unaffiliated competitor would.

In response, IP indicates that the proposed restrictions on employee transfers ignore the fact that competitors can and have benefited from the expertise of utility employees by hiring them.

The Commission has given the comments submitted due consideration and concludes that the proposed changes to the first notice rules are not necessary.

I. Section 450.120 Transfer of Goods and Services

a) Transactions between an electric utility and its affiliated interests shall not be allowed to subsidize the affiliated interests.

b) In connection with an application for a certificate of service authority filed by an affiliated interest of an electric utility, pursuant to Section 16-115 of the Act, the affiliated interest shall provide a copy of a Commission approved services and facilities or affiliated interest agreement that explicitly addresses the cost allocation and valuation methodology to be applied to any transfer of goods and services: between the electric utility and its affiliated interests in competition with ARES; between the utility and its other affiliated interests and; between the utility's other affiliated interests and its affiliated interests in competition with ARES. In the event that there is no Commission approved agreement addressing these issues, the applicant shall submit such an agreement for approval as part of its application.

c) Costs associated with the transfer of goods and services between an electric utility and its affiliated interests, including affiliated interests in competition with alternative retail electric suppliers, shall be priced as specified in, and allocated pursuant to the Commission approved services and facilities agreement or affiliated interests agreement presented in the affiliated ARES certification proceeding. Any transfer of goods and services between an electric utility and its affiliated interests, including affiliated interests in competition with alternative retail electric suppliers, that is not explicitly addressed in a Commission approved services and facilities or affiliated interests agreement is prohibited unless the transfer has been otherwise specifically approved by the Commission pursuant to Section 7-101 of the Act or approval has been waived by statute or Commission rule.

Enron et al. and C&GP recommend that the Commission reject services and facilities agreements ("SFAs") as well as affiliated interest agreements ("AIAs") as the mechanism for pricing and allocating costs of transactions between utilities and their

affiliates. Instead, they recommend that the Commission adopt uniform record keeping and accounting requirements for such transactions. C&GP claims that SFAs and AIAs are vulnerable to risk-free, abusive interpretations that support sweetheart deals, cross-subsidies, and anti-competitive discrimination in favor of utilities and their affiliates. C&GP assert that reliance on the widely divergent terms of AIAs and SFAs also invites non-uniform record-keeping. As a result, C&GP asserts, without a uniformity requirement, record-keeping can be innocently haphazard or intentionally evasive.

Enron et al. state that the proposed rules would require consumers and competitors to participate in at least nine separate proceedings in which each utility would present its own proposed agreement to govern affiliate transactions and record keeping. Enron et al. assert such an approach is inefficient, burdensome and contrary to the clear requirement in the 1997 Act that the Commission adopt affiliate transaction rules. Finally, Enron et al. claim such an approach will also disrupt and discourage development of a competitive market by introducing an element of confusion and impermanence.

IP responds to the C&GP and Enron et al. claims that this section should be modified. IP states that subsection (a) renders illegal transactions that would operate to subsidize affiliated interests with ratepayer dollars. IP further states that, with a few exceptions, subsection (c) prohibits the transfer of goods and services between an electric utility and its affiliated interests unless a Commission approved SFA or AIA is in place. IP argues that Enron et al. ignore that the Commission has already approved many different SFAs and AIAs. IP responds to the C&GP concern regarding non-uniform record-keeping by stating that such concerns apply equally today, and that all indications are that the Commission is doing a fine job of preventing cross-subsidization.

The Commission has reviewed the comments and sees no reason to modify this Section.

J. Section 450.130 Lists of Affiliated Interests and ARES

a) Each electric utility shall maintain an accurate list of all its affiliated interests. Such list shall include the name and address of each affiliated interest and the name and business telephone number of at least one officer of each affiliated interest. The electric utility shall make this list available to the public upon request.

b) The electric utility shall file this list and any subsequent changes to the list with the Chief Clerk of the Commission. The electric utility shall also send copies of the list and subsequent changes to the Director of the Accounting Department and the Manager of the

Consumer Services Division of the Commission. The Chief Clerk of the Commission shall make the most recent list of each electric utility available to the public upon request.

c) All ARES, including any utility affiliated ARES shall, upon certification, but prior to commencing marketing operations, provide to each electric utility in each area of the ARES' certification, notice of the ARES' certification, its trade name, local address and address for service of process, local telephone number and telephone number of its parent company, local fax number and fax number of its parent company and Internet address, if any, of it and its parent company.

d) The electric utility shall receive and compile all information submitted under subsection (c) above and shall make this information available to the public upon request.

IP recommends two alternatives: (1) delete the entire Section, or (2) modify subsection (a) to apply only to affiliated interests in competition with ARES; delete subsections (c) and (d); allow the utility to redact the name of affiliated interests in competition with ARES if disclosure would divulge proprietary information of sensitive business strategies; and exclude the following from the list of the utility's affiliated interests: corporations that are affiliated interests of the utility solely because they share a common director and individuals who are affiliated interests solely because they are an elected officer or director of the utility.

IP asserts that this Section is not necessary for the development of a competitive market. IP indicates that the only relevant list is one that contains the electric utility's affiliates that sell electricity to retail customers in the utility's service territory. IP also asserts that this Section is unconstitutional since it forces an electric utility to associate with messages with which it disagrees and entities to which it is adverse. Finally, IP contends that this Section is contrary to Section 16-117(j) of the Act since it imposes the cost of maintaining the list of ARES on the utility.

MidAmerican recommends that subsection (d) be modified to require the Commission to provide the information specified in subsection (c) to the electric utilities. MidAmerican asserts that this modification will result in consistent and complete information about ARES.

PG&E recommends that this Section be modified to require that the electric utility and the Commission's Chief Clerk each provide lists of ARES providing service to customers served by the utility whenever the public requests information about utility

affiliates. PG&E contends that the provision of information about utility affiliates and non-affiliated ARES at the same time will avoid any implication that the utility's affiliated interests have been endorsed by the utility or the Commission.

The Commission concludes, based upon its review of the comments submitted by the parties, that no changes to the first notice rules are necessary.

K. Section 450.140 Maintenance of Books and Records and Commission Access

a) An electric utility shall maintain books, accounts, and records separate from those of its affiliated interests.

b) In connection with an application for a certificate of service authority filed by an affiliated interest of an electric utility, pursuant to Section 16-115 of the Act, the affiliated interest shall provide a copy of a Commission approved services and facilities or affiliated interest agreement that explicitly sets forth both the cost allocation guidelines and the accounting conventions to be applied to any transactions: between the electric utility and its affiliated interests in competition with ARES; between the utility and its other affiliated interests and; between the utility's affiliated interests in competition with ARES and its other affiliated interests. In the event that there is no Commission approved agreement addressing cost allocation and accounting conventions, the applicant shall submit such an agreement for approval as part of its application.

c) Upon the request of the Commission, electric utilities shall make personnel available who are competent to respond to the Commission's inquiries regarding the nature of any transactions that have taken place between the electric utility and its affiliated interests, including but not limited to the goods and services provided, the prices, terms and conditions, and other considerations given for the goods and services provided.

d) Each electric utility shall maintain a log detailing: (i) each instance in which it exercised discretion in the application of tariff provisions; (ii) each instance in which it offered affiliated interests or customers of

> **affiliated interests services not governed by tariffs, except for corporate support transactions and services which have been declared competitive pursuant to Section 16-113 of the Act; and (iii) each instance in which it offered affiliated interests or customers of affiliated interests a discount, rebate, fee waiver or waivers of the electric utility's ordinary terms and conditions in connection with services provided under tariffs on file with the Commission. The electric utility shall make such log available to the Commission upon request. The log shall contain the following information:**

IP, ComEd and Ameren recommend the deletion of subsection (d). They contend that the log requirement violates Section 16-116(b) of the Act since it adds terms and conditions to a utility's competitive services. IP and ComEd also contend that logs are not necessary to ensure that utilities are not discriminating in favor of their affiliates. They indicate that the utilities' competitors and customers, as well as consumer and governmental representatives, will be vigilant for real or perceived discrimination. They also contend that the log requirement is overly broad and will require utilities to monitor whether their customers are customers of any of their affiliates. If subsection (d) is not deleted, IP recommends that all competitive services be exempted from the log requirement in (d)(ii) and that electric utilities be allowed to designate the logs as confidential to protect competitively sensitive information.

C&GP and Enron et al. oppose the reliance on SFAs and AIAs in subsection (b) for cost allocation guidelines and accounting conventions for the same reasons that they oppose the use of such agreements in Section 450.120 of the rules.

Having reviewed the comments of the parties, the Commission concludes that the first notice rules require no changes.

L. Section 450.150 Internal Audits

CG&P and Enron et al. endorse the internal audit requirements in this Section. They recommend, however, that this Section also require utilities to submit compliance plans explaining the actions taken to comply with the rules. C&GP asserts that the compliance plans will enable the Commission to determine whether enforcement proceedings or rule changes are needed.

The Commission has reviewed the comments of the parties and concludes that the proposal to require compliance plans is unwarranted.

M. Section 450.160 Complaint Procedures

C&GP and Enron et al. recommend that this section be expanded to include expedited complaint procedures. They assert that expedited complaint procedures are necessary for the development of competition. C&GP proposes that the Commission enter a final order within 45 days after a complaint is filed that alleges irreparable harm to the competitive market. C&GP also recommends that the rules establish penalties for violations by the utilities.

The Commission has reviewed the comments of the parties and concludes that the proposals to include expedited complaint procedures and penalties on utilities should be rejected. If a complaint requires expedited treatment, the parties are free to request such treatment in their pleadings. Furthermore, the penalties that may be imposed on utilities are limited to those specified in the Act.

N. Implementation Period for the Rules

ComEd requests that utilities not be required to implement the rules until May of 1999, when ARES are eligible for certification. ComEd asserts that it needs time to restructure its operations in accordance with the rules. ComEd indicates that it and its parent, Unicom, have approximately 18,000 employees, operate numerous facilities and conduct their operations in accordance with long-established practices.

C&GP opposes ComEd's proposed delay in the implementation period. C&GP asserts that the delay would allow utilities to take actions that significantly damage the development of the competitive market.

The Commission rejects ComEd's proposed delay in the implementation of these rules. Any delay in implementation would allow utilities the opportunity to circumvent rules which are necessary to implement the mandate contained in Section 16-121 of the Act.

III. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) the Commission has jurisdiction over the parties hereto and the subject matter herein;

(2) the recitals of fact set forth in the prefatory portion of this order are supported by the record and are hereby adopted as findings of fact;

(3) the proposed rules at 83 Ill. Adm. Code 450, as reflected in the attached Appendix, should be submitted to the Joint Committee on Administrative Rules to begin the second notice period.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the proposed rules at 83 Ill. Adm. Code 450, as reflected in the attached Appendix, be submitted to the Joint Committee on Administrative Rules, pursuant to Section 5-40(c) of the Illinois Administrative Procedure Act.

IT IS FURTHER ORDERED that this order is not final and is not subject to the Administrative Review Law.

By order of the Commission this 14th day of September, 1998.

(SIGNED) RICHARD L. MATHIAS

Chairman

(S E A L)